Supreme Court, U.S.
FILED
FEB 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-905

In The

Supreme Court of the United States

October Term, 1988

PAUL C. KOHLMAN,

Petitioner,

v.

MANUEL LUJAN, JR., ET AL,

and

BOB MARSHALL ALLIANCE, ET AL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

ERIC TWELKER
MARTHA PHILLIPS ALLBRIGHT
Mountain States Legal Foundation
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264

WILLIAM H. COLDIRON
Counsel of Record
GOUGH, SHANAHAN, JOHNSON & WATERMAN
301 First National Bank Building
Helena, Montana 59624

TABLE OF CONTENTS

Page

ARGUMENT 1

I. Contrary to the Assertions of the Respondents; the Decisions in *Bob Marshall, Conner,* and *Park County* Rely on Conflicting Rules of Law; Not on Case-Specific Facts 2

II. The Issue of This Case Is Not Whether Any Environmental Review Should Be Done, But Is the Requirement of Superfluous Environmental Review 5

III. The Petitioner's Lease Was Not Cancelled 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES:

Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988) ..... *passim*

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) .. *passim*

Park County Resources Council v. United States Department of Agriculture, 817 F.2d 609 (10th Cir. 1987) 2, 3, 5,

Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983) 3

United States v. Diebold, 369 U.S. 654 (1962) 3

No. 88-905

In The

Supreme Court of the United States

October Term, 1988

PAUL C. KOHLMAN,

Petitioner,

v.

MANUEL LUJAN, JR., ET AL,

and

BOB MARSHALL ALLIANCE, ET AL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

In response to the briefs in opposition filed by the Bob Marshall Alliance and the Department of Justice, petitioner Kohlman respectfully submits the following reply.

I. CONTRARY TO THE ASSERTIONS OF THE RESPONDENTS; THE DECISIONS IN *BOB MARSHALL, CONNER,* AND *PARK COUNTY* RELY ON CONFLICTING RULES OF LAW; NOT ON CASE-SPECIFIC FACTS

The role of the specific environmental values of the affected land in this case and the conflicting *Park County* case has been greatly confused. In their briefs, the respondents presented copious facts about the nature of the area where the petitioner's lease is located. They then argued that the decisions in *Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988), *Bob Marshall Alliance v. Hodel,* 852 F.2d 1223 (9th Cir. 1988), and *Park County Resources Council v. United States Department of Agriculture,* 817 F.2d 609 (10th Cir. 1987), turned on the site-specific environmental sensitivity of the respective areas. Alliance Brief at 15, Department Brief at 9. Examination of the opinions in those cases does not support their conclusion.

The legal analysis of each of the decisions makes no reference to the case-specific facts; but instead, each decision relies solely on prior case law or general facts not specific to an area. *Park County* relies on the general fact that environmental impacts of full field development cannot be predicted at the leasing stage prior to exploration.[1] 817 F.2d at 622-3. Conner relies solely on the holding

---

[1] The Federal Respondent's allegation that the plaintiff in *Park County* failed to meet its burden of proof is misleading. Department Brief at 8. The reason for the failure is found in the cited paragraph: "The oil and gas lease, by itself, does not cause a change in the physical environment." 817 F.2d at 622. This statement is at direct odds with *Conner* and *Bob Marshall.*

in *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), and the fact that, like the leases in *Sierra Club v. Peterson*, lease documents did not contain a stipulation completely precluding surface disturbance prior to completion of an EIS.[2] 848 F.2d at 1449. *Bob Marshall* relies solely on the holding in *Conner*, and simply contains no reference to any case-specific facts. App. 11-12.

In fact, the absence of case-specific facts in the analysis of the opinions presents an excellent opportunity for the Court to decide the important issues of the legal scope of NEPA review in the absence of confusing facts.

In all cases, as in the three discussed here, the courts will include introductory background facts. Opponents of a petition can always argue that those facts are somehow determinative of a case. In the present case, there is simply no reasonable basis for the confusion, since *Conner, Bob Marshall* and *Park County* contain no references to case specific facts in their legal analyses.

Respondent Bob Marshall Alliance takes the fact-specific confusion to an extreme. It claims that "timing of an EIS is determined on a case by case basis depending on two factors: (1) whether the lease approval represents an irretrievable commitment of resources; and (2), whether the potential environmental impacts are significant." Alliance Brief at 15. For this proposition, it does not cite to the

---

[2] *Conner* does reject the possibility of mitigation, which was a disputed fact and, accordingly, cannot be appropriately relied on at summary judgment. *United States v. Diebold*, 369 U.S. 654 (1962).

opinion or any other case. There is simply no authority for this argument.

Conner and *Bob Marshall* use a purely legal formula to conclude that an EIS and a biological opinion covering full field development are required for lease issuance, but do not set environmental standards. For this reason, oil and gas lessees are left at the mercy of third party litigants who would use the precedent of *Conner*. Groups such as the Bob Marshall Alliance may invoke *Conner's* rule requiring an EIS for leasing by simply suing and demanding that the legal formula be applied. The effect will be to eliminate leasing or greatly increase its cost in areas where there is opposition to leasing.

While the Federal Respondents agree with the petitioner that the Ninth Circuit is wrong, they hope that future courts will distinguish the seemingly absolute holdings of *Conner* and *Bob Marshall*. Department Brief at 7-10. This is overly optimistic. For the leasing program to work efficiently, the executive branch, not the judiciary, must define the leasing program. The effect of the government's litigation strategy is to take discretionary decisions away from the land management administrative agencies and give them to the courts and litigants. If the strategy is allowed to take its course, such things as forum shopping, the individual proclivities of judges, and the particular issues raised by litigants will shape the future of the oil and gas leasing program.

It has taken eight years for this case to reach this forum. It may take an equal time to develop the distinguishing authority that the government hopes for. The

cost of another eight years of chaos in the leasing program will be substantial. Now is the time for this Court to review this issue and put it to rest.

II. THE ISSUE OF THIS CASE IS NOT WHETHER ANY ENVIRONMENTAL REVIEW SHOULD BE DONE, BUT IS THE REQUIREMENT OF SUPERFLUOUS ENVIRONMENTAL REVIEW

Respondent Bob Marshall Alliance suggests that reversing *Conner* would result in no environmental review. Alliance Brief at 17-18. This is simply not the case. Regulations and statutes require environmental review and approval at every stage of development of an oil and gas field. *See* 817 F.2d at 622.

The Alliance inappropriately relied on *Park County's* finding of future environmental review to distinguish that case from *Bob Marshall.* In fact, *Park County* considered the same kinds of reviews and approvals under the same regulations that were in force in the case at the bar. Nevertheless, *Park County* came to the opposite conclusion from *Bob Marshall* and held that an EIS for leasing was not necessary.[3] 817 F.2d at 622-3.

The real issue of this case, and the point of distinction between *Bob Marshall* and *Park County* is whether approval of each phase of development should revisit the

---

[3] *Park County* referred to future "environmental assessments" rather than EISs. 817 F.2d at 613. In a quote of *Park County,* the Alliance inserted an ellipsis where the words "environmental assessments" appeared. Alliance Brief at 17. This was inappropriate since the issue of this case and *Park County* is whether leasing requires an EA or an EIS.

prior approvals. Initially, an EIS and a comprehensive land use plan consider environmental and oil and gas values. This planning permits a decision as to whether land should be withdrawn from leasing to protect environmental values, or continue under multiple use management which includes mineral development.[4] Next, an environmental assessment (EA) is completed and a lease is issued. Further approval, and either an EA or EIS is required for seismic exploration, exploratory drilling, development drilling, and for support facilities and access.

The government has established a system where comprehensive resource planning and resource priorities are set prior to leasing. Later environmental review determines how to minimize impacts. With certain exceptions set forth in stipulations, leases are not taken away because resource allocation decisions are made before the leases are issued. In the case of the petitoner's lease, the government evaluated two possible overriding environmental values, endangered species and wilderness, and reserved the right to effectively take away his lease if these were determined to be of paramount value.

---

[4] When the leases in this case were issued, environmental values and oil and gas values were considered in Multiple Use Plans and in a Roadless Area Review and Evaluation (RARE II) EIS. RARE II's decision to allow leasing in the Deep Creek Further Planning Area was not challenged. *Conner* and *Bob Marshall* conflict with both the old and new plans and procedures in the same way.

Under *Conner* and *Bob Marshall*, prior to the time that the government has the site-specific information necessary to do an EIS for full field development, it must reconsider planning and lease issuance decisions each time it makes an additional approval. The lessee could lose his lease when seismic exploration is approved, when exploration drilling is proposed, and so on. It is possible that millions of dollars could be invested in a lease that is later cancelled.

The effect of this process is repeated opportunities for litigation on the same underlying issue. The multiple battles will not result in better leasing decisions, but will only provide avenues for those who would obstruct the process. The real decision-making will move from the land management agencies to the courts.

III. THE PETITIONER'S LEASE WAS NOT CANCELLED

There is simply no basis in the Ninth Circuit opinion for Respondent Bob Marshall Alliance's claim that the lease was set aside because of a failure to consider a meaningful no action alternative. Alliance Brief at 19. The court simply remanded for clarification in light of the opinions in *Bob Marshall* and *Conner*, neither of which set aside leases. App. 18.

CONCLUSION

For the reasons set forth in the petition and this reply, the Court should grant certiorari in this case.

Respectfully submitted,

ERIC TWELKER
MARTHA PHILLIPS ALLBRIGHT
Mountain States Legal Foundation
1660 Lincoln Street
Suite 2300
Denver, Colorado 80264

WILLIAM H. COLDIRON
Counsel of Record
GOUGH, SHANAHAN, JOHNSON & WATERMAN
301 First National Bank Building
Helena, Montana 59624

February, 1989